No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. Douglas Wikle, Trustee in Bankruptcy, for Nevada Henderson Land Co., a corporation,

Appellant,

vs.

Country Life Insurance Company, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

The Mere Dissolution of a Temporary Restraining Order Due to the Debtor's Failure to Present Evidence, Does Not Constitute Permission for Leave to Foreclose Extra-Judicially, or Otherwise.

At page 19 of its brief, Country Life suggests in a footnote, that Appellant is laboring under a "misconception respecting the burden of proof in restraining order matters", noting that under Rule 65, Fed. Rules of Civil Proc., the one seeking the injunctive relief must produce evidence to support it. It is submitted that the

real "misconception" is Appellee's failure to distinguish between the procedural burden of proof in connection with restraining orders, and *the substantive burden* on a secured creditor seeking to foreclose on a debtor or bankrupt's realty, to establish by competent evidence, lack of equity, as a condition precedent to being granted leave to foreclose.

Obviously, anyone seeking a restraining order has the procedural burden of proof. However, and this is perhaps the core issue involved, since a post-bankruptcy foreclosure, or sale under the power of sale, without permission of the bankruptcy court is, at least, voidable (with one possible "exception" to be noted hereinbelow), *the real and substantive burden is on the secured creditor to establish lack of equity in the debtor or bankrupt's real property.* The mere dissolution of the temporary restraining order for technical reasons, and not on the merits (*e.g.,* as here, because the debtor simply abandoned the matter as "moot" as a consequence of its filing of a Chapter X Petition) clearly does *not* amount to an affirmative order granting leave to foreclose, and Country Life's repeated contentions to the contrary are glaring *non sequiturs,* a graphic example of which appears at page 15 of said Appellee's Brief, as follows:

> "When a bankruptcy court declines to restrain enforcement of a security, it is at the same time permitting the enforcement to proceed outside the bankruptcy court."

Clearly, the above conclusion, for which no authority is cited, simply does not follow. The obvious flaw in so sweeping a generality *is the failure to consider the basis for the court's refusal to restrain.* Thus, if fol-

lowing a full trial on the merits, the bankruptcy court should enter findings, adequately supported by the evidence, that no equity exists for the debtor or bankrupt in and to the property in issue, and appropriate conclusions of law and an Order refusing to continue the restraint, and granting leave to foreclose, Appellee's conclusion would be correct. However, where, as here, the court's refusal to restrain is predicated upon mere technical reasons, not going to the merits of the issue of equity in the property, then the court's refusal most obviously does *not* constitute a permission to proceed to sell or foreclose. In short, only when the refusal to restrain results from a trial on the merits, on the issue of the presence or absence of equity, can such refusal be interpreted as a permission to foreclose.

In addition to the authorities cited in Appellant's opening brief, pages 14 to 19, for the proposition that extra-judicial sales, after bankruptcy and without the permission of the bankruptcy court, are voidable (*e.g.*, 5A Remington on Bankruptcy, §2357, §2374; *Re Hasie* (D.C., Tex., 1913), 206 Fed. 789; 8 Collier on Bankruptcy, p. 264, footnote No. 10 and p. 272; *Lockhart v. Garden City Bank & Trust Co.* (2nd Cir., 1940), 116 F. 2d 658), this court in a 1967 decision, *Groves v. Fresno Guarantee Sav. & Loan Ass'n*, 373 F. 2d 440, stated the following at page 443:

> "But when the bankruptcy proceeding intervened Appellee could no longer institute such a suit nor take any other steps to enforce its lien, without permission of the bankruptcy court. See *Investors Syndicate v. Smith*, 9 Cir., 1939, 105 F. 2d 611, 621. Accordingly, Appellee's only recourse was in the bankruptcy court."

(See, also, *Pasadena Investment Co. v. Weaver* (9th Cir., 1967), 376 F. 2d 175, 178; and *Loyd v. Stewart & Nuss, Inc.* (9th Cir.), 327 F. 2d 642, 645).

The one possible "exception", heretofore mentioned, to the rule that a post-bankruptcy foreclosure, without the bankruptcy court's permission, is, at least, voidable, is the situation in which a legitimate, judicial foreclosure proceeding, commenced prior to bankruptcy, is concluded thereafter in a so-called "straight bankruptcy" proceeding. (In a Chapter XI case, the foreclosure could, at least, be restrained (§314) of the Bankruptcy Act. (U.S.C. §714), and in a Chapter X, the reorganization court could place its trustee in possession of the property and restrain further proceedings to foreclose (§ 148, § 256 and § 257 of the Bankruptcy Act [11 U.S.C. § 548, § 656 and § 657]).

It is again submitted that *any* extra-judicial, post-bankruptcy sale, without the permission of the bankruptcy court, is voidable, and will be voided on a showing of either (1) an equity in the property; (2) fraud; (3) other inequitable conduct; and, (4) *a fortiori,* if any combination of such factors are present.

Since, as we submit, the extra-judicial sale involved herein is voidable even as against the debtor, now bankrupt, it is certainly voidable as against Appellant, and the creditors, who were not parties to the proceeding out of which the order dissolving the restraining order, was entered.

It is again appropriate to note that the pre-bankruptcy, state court action involved herein was *not* a foreclosure proceeding; hence the "exception" to the rule, heretofore noted, is totally inapplicable here, even assuming, solely *arguendo,* that this case was a so-called "straight bankruptcy". In this connection, it should

be further noted that although the receiver appointed in *Emil v. Hanley,* 318 U.S. 515, was to collect rents, as noted at page 11 of Country Life's Brief, nevertheless, the action there involved *was a judicial foreclosure proceeding.*

Actually, the facts of this case, involving a non-foreclosure action, constitute a "hybrid" situation, the more "typical", and "harder" case being the situation in which the secured creditor commences a pre-bankruptcy foreclosure suit and, at the same time, initiates steps preliminary to sale under the power of sale, his actual intent being to utilize the latter method of foreclosure. By thus proceeding, secured creditors can urge the pendency of the state court foreclosure action as depriving the bankruptcy court of jurisdiction, and proceed to sell extra-judicially, thereby depriving the trustee, and creditors, of right to redeem the property within one year, where, as here, the property is sold for less than the total judgment (*i.e.,* the gross sum owing under the Deed of Trust), C.C.P. § 725a.

Ironically, in a Chapter XI proceeding involving precisely such facts, Counsel for Country Life argued most eloquently that the bankruptcy court may restrain such foreclosure proceedings, and in so doing, advanced arguments, and a philosophy, in close harmony with Appellant's position. Thus, in their brief filed in the Central District of California, in the Matters of Kirk Gillett, Adrian Gillett and Kate Gillett, No's. 208,053-EC, 208,054-EC and 208,055-EC, respectively, Counsel for Country Life argued as follows at pages 6, *et seq.:*

> "Petitioner (the secured creditor) was proceeding alternatively to foreclose its deed of trust when these Chapter XI proceedings were filed on March

31, 1966. Petitioner's Superior Court action for judicial foreclosure was commenced on December 30, 1965. Concurrently therewith and independently therefrom, Petitioner pursued its power of sale foreclosure. In point of fact, foreclosure under Petitioner's deed of trust via the power of sale method was scheduled for April 1, 1966, the day following the inception of these Chapter XI proceedings.

"*While Petitioner makes much of the sanctity of its pre-bankruptcy State Court foreclosure proceeding, the reality is that it was preparing to realize upon its security by the non-judicial method. The safeguards present in a judicial foreclosure,* such as court supervision and the ability of a bankruptcy trustee to intervene, *Straton v. New,* 238 U.S. 318, which might prompt the Bankruptcy Court *in straight bankruptcy proceedings* to decline injunctive relief, *are most assuredly not present in the informal power of sale foreclosure.*

"The cases of *Straton v. New* supra, and *Emil v. Hanley,* 318 U.S. 515, . . . *are cases arising in straight bankruptcy,* where, as will be subsequently indicated, the power to enjoin is substantially less than in Chapter XI. If, as Petitioner urges, the Referee, in straight bankruptcy proceeding. . . . could not restrain its judicial foreclosure, *it does not follow therefrom that the Referee would also lack the jurisdiction in such bankruptcy proceeding to enjoin Petitioner's power of sale foreclosure, particularly where as here the judicial proceeding is not the true vehicle of foreclosure.*

"As Petitioner indicates in its Memorandum, it is the law in this State that foreclosure by the

twin methods of the judicial proceeding and the power of sale may be pursued concurrently until the event of foreclosure in one of the two permissible ways occurs. That being the case, *if Petitioner's concept of the law is correct, a secured creditor, by the simple device of instituting a specious judicial foreclosure proceeding and thereafter actively pursuing power of sale, could render the Bankruptcy Court helpless to safeguard the equity in the foreclosed property for the benefit of creditors. Logic cries out against such a result. . . .*

"In addition to the expanded jurisdiction conferred upon the Bankruptcy Court by Section 314 to restrain the enforcement of liens in Chapter XI proceedings, a further extension of the 'actual or constructive possession' test of straight bankruptcy is found in Section 311 of the Bankruptcy Act *which confers summary jurisdiction in the Chapter XI Court over property owned by the debtor irrespective of where located at the date of the filing of the Chapter XI proceedings.*

" 'With some exceptions, where a third party in an ordinary bankruptcy proceeding under Chapters I to VII has possession of the property involved and asserts a substantial adverse claim thereto, the Bankruptcy Court does not require (sic) summary jurisdiction over a controversy with respect to that property, even though ownership of the property is in the bankrupt. *As a result of § 311, however, the court in a proceeding under Chapter XI has summary jurisdiction over a controversy in that situation'.* 8 Collier on Bankruptcy, 14th Ed., pp. 177-179." (Emphasis Added).

Clearly, the whole tenor of the foregoing arguments is in marked contrast to, if not in total conflict with, the arguments advanced by Counsel for Country Life herein.

Since the Order of January 14, 1966, did not even purport to grant leave to foreclose, and since the Order of March 3, 1966, is patently void as against Appellant, who was not a party thereto, and had neither notice nor opportunity to be heard, and since the latter Order is additionally improper because it is supported by neither findings nor any evidence whatsoever, Appellee's argument that the property was voluntarily "delivered" to Country Life is clearly without merit.

Had there been entered proper findings, conclusions and an Order, expressly granting leave to foreclose, following a trial on the merits, the findings being supported by the evidence, and had Appellant been properly made a party thereto, given both notice and an opportunity to be heard, Appellee's "voluntary delivery" argument might have some merit, at least after the order became final; however, in light of the actual facts of this case, it is submitted that such theory is clearly inapplicable.

A further not inconsequential defect in the orders of January 14, 1966, and March 3, 1966, not heretofore mentioned, is the fact that both orders were entered in unusual, if not unseemly, haste, and both were likewise entered without any compliance with Local Rule 7a, of the District Court, which prescribes the form and manner for the entry of "Orders, Judgments, Findings and Conclusions of Law." In short, secrecy and haste appear to be a characteristic of both said orders.

II.

Appellees Ignore the Distinction Between Jurisdiction to Oust the State Court Receiver, and Jurisdiction to Restrain a Post-Bankruptcy, Extra-Judicial Sale, or to Avoid Such a Sale Conducted Without the Court's Permission.

Entirely aside from very serious questions as to the legitimacy of the State Court "receivership", which we again submit was and is utterly spurious on its face, nevertheless, even assuming, solely for argumentative purposes, that the state court receivership was valid, and that the bankruptcy court, accordingly, lacked jurisdiction to oust the state court receiver, and place its own receiver in possession of the debtor's real property, it by no means follows therefrom that the bankruptcy court would lack jurisdiction, even in a "straight bankruptcy", to restrain an extra-judicial, post-bankruptcy sale, or to avoid such a sale conducted without its permission. Thus, whether by accident or design, Appellees have confused the issue of jurisdiction by ignoring this vital distinction, and have thereby apparently persuaded the lower courts to accept the *non sequitur* that if the court lacked jurisdiction to supplant the state court receiver, the court likewise lacked jurisdiction to either restrain or avoid an extra-judicial, post-bankruptcy sale, a conclusion which we submit is patently erroneous.

It is notable that in their brief in the *Gillett* matters, a portion of which is quoted *supra,* Counsel for Country Life expressly recognized that even if the bankruptcy court could not, in a "straight bankruptcy" proceeding, restrain a judicial foreclosure sale, "it does not follow therefrom that the Referee would also lack the jurisdiction in such bankruptcy proceeding to enjoin

Petitioner's power of sale foreclosure, particularly where as here the judicial proceeding is not the true vehicle of foreclosure." This should follow *a fortiori* where, as here, the state court action is *not* a "foreclosure proceeding", since such state court action is obviously, and, necessarily, not the "true vehicle of foreclosure."

Thus, even assuming that the court lacked jurisdiction to supplant the state court receiver with its own (a proposition which Appellant disputes in view of the fictitious, if not fraudulent, nature of the state court "receivership"), it is submitted that even in a so-called "straight bankruptcy", the court would have ample jurisdiction to restrain a post-bankruptcy, extra-judicial sale, or to avoid such a sale conducted without its permission. (5A Remington on Bankruptcy, § 2374, pp. 119, 120; 8 Collier on Bankruptcy, Para. 3.22, p. 264, footnote No. 10; *Re Hasie, supra,* 206 Fed. 789; *Lockhart v. Garden City Bank & Trust Co., supra,* 116 F. 2d 658).

III.

From Its Inception on January 4, 1966, to March 2, 1966, This Was at All Times, Either a Chapter XI or a Chapter X Proceeding.

It is actually unnecessary to belabor this issue, since even in a "straight bankruptcy" proceeding, the bankruptcy court has jurisdiction to restrain a post-bankruptcy, non-judicial sale, or to avoid any such made without the court's permission; however, an error in Appellant's opening brief should be called to the court's attention; thus, at page 12, it is stated that:

> "*Following* the hearing of January 13, 1966, a Chapter X Petition was filed by the debtor and a

new restraining order was procured restraining First American from delivering its deed to Country Life." (Emphasis Added).

In fact, the Chapter X Petition was filed by the then debtor's counsel *before* said hearing, and at the same time he filed the debtor's mislabeled schedules. See, *e.g.,* the transcript of March 3, 1966, containing, *inter alia,* the following statements by Counsel for Country Life:

(1) At page 9, lines 2 to 17, inclusive:

"On that day [i.e., January 13, 1966] Mr. Mathes was not present at 10:00 o'clock; but when he appeared at 10:30 or some time thereafter, *and when he appeared the matter had become moot because a Chapter X proceeding had been filed that morning* . . . Actually Judge Hall, before whom the Chapter X proceeding was pending, had not approved the petition by the time I made a motion not to approve it, so there never was a formal approval of the petition." (Emphasis Added);

(2) At page 10, line 26, to page 11, line 6, inclusive:

"A document was filed, signed by Mr. Mathes on behalf of the debtor, saying the answering party withdrew its proceedings for reorganizing the corporation, which document entitled 'Chapter X', and on March 2, 1966 Judge Hall so ordered, *so we no longer have a Chapter X proceeding.*" (Emphasis Added).

The mere fact that the Chapter X Petition was never approved, does not alter the fact that such proceeding was pending at all times between January 13, 1966, and March 2, 1966, the date on which it was dis-

missed. Of course, the jurisdiction of a reorganization court is far more pervasive even than that of the bankruptcy court in a Chapter XI proceeding, for the reasons, *inter alia,* that a Chapter X reorganization may even deal with, or alter or modify, secured claims (6 Collier on Bankruptcy, 14th Ed., Para. 3.05, pp. 441, 442), and the reorganization court has jurisdiction not only of property in the debtor's actual or constructive possession, *but also property of the debtor in the hands of a lienholder.* (*Warder v. Brady* (4th Cir., 1940), 115 F. 2d 89. See also: *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.* (1935), 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110; *Grand Boulevard Investment Co. v. Straus* (8th Cir., 1935), 78 F. 2d 180; *Matter of Moulding-Brownell Corp.* (7th Cir., 1939), 101 F. 2d 664; *Matter of Prudence Bonds Corp.* (2nd Cir., 1935), 75 F. 2d 292).

Under §111 of the Bankruptcy Act (11 U.S.C. 511) the reorganization court has "exclusive jurisdiction of the debtor and its property, wherever located."

Since this proceeding was quite clearly a Chapter XI or X proceeding at all times from January 4, 1966 through March 2, 1966, no useful purpose would be served by further consideration of Appellees' untenable arguments that the case was a so-called "straight bankruptcy" during said period.

IV.

Appellees' Arguments Re "Discretionary Jurisdiction" Are Clearly Without Merit.

As set forth in Appellant's Opening Brief, pages 34 to 40, inclusive, the facts of this case clearly require the bankruptcy court's exercise of its exclusive jurisdiction, and, for the reasons, and on strength of the authorities cited, preclude any alleged "discretion" to decline to exercise such exclusive jurisdiction. It is submitted that the decisions in *Matter of Chicago & Northwestern Ry. Co.* (7th Cir., 1942), 127 F. 2d 1001, cert. den., 317 U.S. 659, and in *Matter of J. Rosen & Sons, Inc.* (3rd Cir., 1942), 130 F. 2d 81, are directly in point and are also decisive, and, further, that the "exception" enunciated in *Thompson v. Magnolia Petroleum Co.* (1940), 309 U.S. 478, has no rational application to the facts herein.

Ignoring that the vital issue of equity in the bankrupt's real property is irrelevant under state law (and, indeed, even suggesting, in a footnote on page 20, that such issue "possibly has relevance", without any citation of authority under California law) Country Life, at page 21, cited certain alleged authorities, but without demonstrating in any manner, their applicability to the facts of this case. Included among the authorities so cited by Country Life is this court's opinion in *Matter of Terrace Lawn Memorial Gardens* (9th Cir., 1958), 256 F. 2d 398. Even the most cursory reading of this decision reveals it to be readily distinguishable from the facts involved herein. Thus, not only did the questions in issue relate solely to matters of the law of the State of Idaho, but the litigation had been commenced a number of months prior to the filing of

the reorganization proceeding, and, as a matter of fact, the state court action was "on the eve of trial when the reorganization petition was filed." (p. 402). At page 401, the court summarized the issues involved in the state court action as follows:

> "The questions presently before the state courts are (1) whether, in the transactions relating to the transfer of certain lands, the debtor corporation was charged usurious interest; and (2) whether Dharity, who claims to be President of the corporation and who filed the petition for reorganization, is a stockholder; *and another, which governs the second, (3) whether the pledge of stock of this Idaho corporation, the foreclosure thereof and transfer by the depositary to the nominee of Doty, would be recognized under the laws of Idaho.*" (Emphasis added).

As further noted by the court at page 402, prior pendancy of state litigation is a "strong factor" in favor of permitting the action to proceed in the state court, especially where the trial in the state court is imminent, and the issues involved relate solely to state law. In the instant case, in complete contrast, the primary issue, viz.: the presence or absence of equity, is not only peculiarly an issue under the bankruptcy law, but, as previously noted, is actually irrelevant under the law of California, and to remand Appellant to the State Court would manifestly deprive him of his strongest, and possibly, only position, to the irreparable damage to the bankrupt estate and the creditors thereof. In other words, in this case the issue of equity in the property *is not only primary, but dispositive*, rendering it totally unnecessary to even consider whether the sale of Janu-

ary 14, 1966, is possibly also voidable under the law of California, by reason of announcements made immediately before the sale.

In *Terrace Lawn, supra,* again, the *only* issue involved state law, and, as previously noted, not only had the State Court action been pending long prior to the Chapter X proceeding, but the matter was on the "eve of trial". Clearly, none of the factors involved in the *Terrace Lawn* decision are remotely analogous to the facts hereof. The other authorities cited by Country Life at page 21 of its brief, are equally far afield and equally distinguishable on their face. As an example, Country Life, at page 22 of its brief, cites *Suhl v. Bumb* (9th Cir., 1965), 348 F. 2d 869, as a "recent case in point", for the proposition that where the existence of jurisdiction is "doubtful", bankruptcy courts are well advised to remit the parties to another forum. Not only are the facts of the *Suhl* case totally dissimilar in relation to the facts herein, but the case involved so obvious an excess of the bankruptcy court's jurisdiction, that it is difficult to understand how the question of jurisdiction in *Suhl* can possibly be characterized as "doubtful".

V.

Courts of Bankruptcy Cannot Be Deprived of Jurisdiction Merely Because They Cannot Award Complete Relief to All Parties Who May Be Indirectly Affected by Their Orders.

At pages 22 and 23 of its brief, Country Life argues that the bankruptcy court probably lacks jurisdiction to award "complete relief" to all parties who may be affected, directly or indirectly, should the post-bankruptcy sale of January 14, 1966, be avoided. As an example,

said Appellee sugges s that in the event of avoidance, Country Life might possibly have a cause of action against the Trustee under its Deed of Trust, presumably for expressing honest doubts as to the propriety of the sale, in view of the pendency of the Trustor's Chapter XI proceeding.

That the argument is unsound and diversionary is evident from the facts: (1) that Country Life, significantly, does not expressly urge that the inability to award "complete relief" deprives the court of jurisdiction it otherwise has, and, instead, it merely "suggests" that "the Referee rightfully concluded that 'fairness' required the case to be heard by a court which could fully grant the appropriate relief and adjust all of the rights of the litigants"; and (2) no authority is cited for the theory advanced. (While the *Suhl* case is again cited, it does not remotely stand for the proposition suggested by Country Life).

Clearly, the mere fact that an order of a bankruptcy court may "trigger" tangential litigation in other courts by or against parties affected, does not deprive the court of jurisdiction, nor does it give rise to any "discretion" in the bankruptcy court to decline to exercise jurisdiction which it otherwise has. Were the rule otherwise, the result would go far, indeed, toward the total elimination of the effectiveness of courts of bankruptcy, since in a high percentage of instances, orders of courts of bankruptcy do, in fact, lead to litigation by and between parties over whom the court lacks jurisdiction. Thus, for example, whenever the bankruptcy court invalidates a security interest in the real or personal property of a bankrupt, the secured creditors may, in most instances, have, or assert, a cause of action in a

State Court against an attorney, escrow holder, real estate broker, etc., for alleged malpractice or negligence based upon the acts or omissions which prompted the invalidation of the security interest. While the bankruptcy court in the overwhelming majority of such cases, lacks jurisdiction over such third parties, this fact has never been suggested, much less held, to deprive the court of its jurisdiction to adjudicate the validity of liens asserted on property in the court's actual or constructive possession, nor to give rise to any alleged "discretion" to refuse to exercise its exclusive jurisdiction.

VI.

Appellees' Venue Argument Is Wholly Lacking in Merit.

§ 2(a) (1), (11 U.S.C. § 11a) confers upon courts of bankruptcy jurisdiction to:

> "(1) Adjudge persons bankrupt who have had their principal place of business, resided *or* had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction. . . ." (Emphasis added).

As noted in 1 Remington on Bankruptcy, § 44, p. 87:

> "This statute [*i.e.*, § 2(a) (1)] is disjunctive. It is not necessary that the debtor have his residence, domicile, *and* principal place of business in the district, or that he have any two of them within the district, in order to give a particular court jurisdiction." (Emphasis, the Editors').

Contrary to Country Life's gratuitous observation that the bankrupt's representation, that its principal place of business is in Beverly Hills, California, is

"questionable", because its sole business involved the hospital in San Mateo County, it has long been recognized that a corporation's "principal place of business" may be its home office, rather than the locale of its actual operating facility. Thus, in 1 Remington on Bankruptcy, § 47, the following appears at page 93:

> "The 'home office' may well be considered the principal place of business, however, where it is the principal and controlling center of operations, *notwithstanding production or distribution facilities, such as mines or factories, are located elsewhere.*" (Emphasis Added).

Furthermore, the provisions of § 2(a) (1) relate "to venue rather than jurisdiction". (*In re Eatherton,* [8th Cir., 1959], 271 F. 2d 199), and, in any event, the matter is not subject to a belated, or collateral, attack. (1 Remington on Bankruptcy, § 43, p. 86; *Fairbanks v. Wills,* 240 U.S. 642, 60 L. Ed. 841, 36 S. Ct. 466; *Hamilton Gas Co. v. Watters* [4th Cir., 1935], 79 F. 2d 438).

Country Life's unfounded assertion that there is no "legitimate creditor interest", totally ignores the provisions of § 57n of the Bankruptcy Act (11 U.S.C. § 93n) pursuant to which "late filed" claims may be allowed whenever a surplus exists over the aggregate of claims filed. Furthermore, not only is there no evidence whatever to support the insinuation that the sole claim thus far filed is of "questionable validity", but the merits of that claim have never been an issue in this case.

Perhaps even more pernicious is the premise of Country Life's argument in this respect, viz.: that an injustice may be allowed to stand if only a limited num-

ber of persons have been damaged thereby, a "theory" which is obviously irreconcilable with our principles of jurisprudence, and, indeed, any system of justice worthy of the name.

VII.

Appellees Have Utterly Failed to Answer the Serious Question of Due Process of Law Involved Herein.

Probably the most fundamental issue involved is the question whether the creditors of a debtor or bankrupt estate can be deprived of a valuable equity in property by reason of an order, or orders, entered in a proceedings to which their legal representative, viz: the Receiver or Trustee in Bankruptcy, was not made a party, and had neither notice nor opportunity to be heard. To this basic question, which we submit virtually answers itself, Appellees' only real response is the inane obervation, at page 20 of Country Life's brief, that "the receiver *chose* not to intervene". (Emphasis Added). It is respectfully submitted that virtually any layman would recognize this as no answer at all.

Conclusion.

It is again respectfully urged that the several orders entered herein by the Referee and District Court be reversed, and that the real property in question be adjudged to be an asset of the bankrupt estate, subject to the legitimate liens of record as of the inception of the proceeding on January 4, 1966.

Respectfully submitted,

Joseph S. Potts,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. POTTS